6355. Alleged misbranding of digester tankage. U. S. * * * v. Joslin-Schmidt Co., a corporation. Tried to the court and a jury. Verdict of not guilty. (F. & D. No. 8301. I. S. Nos. 19636–m, 11340–m.)

On September 14, 1917, and May 14, 1918, the United States attorney for the Southern District of Ohio, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district informations against the Joslin-Schmidt Co., a corporation, Cincinnati, Ohio, alleging shipment by said company, in violation of the Food and Drugs Act, on or about May 15, 1916, and trading under the name of The Groves Fertilizer Works, on or about October 2, 1916, from the State of Ohio into the State of Indiana, of quantities of an article labeled in part, "The Joslin-Schmidt Company, of Cincinnati, Ohio, Guarantees this 'Abattoir Brand' Digester Tankage to contain not less than * * * 60.0 per cent. of crude protein," which was alleged to have been misbranded.

Analyses of samples of the article by the Bureau of Chemistry of this department showed the following results:

	Shipment of May 15	Shipment of Oct. 2
Nitrogen (per cent)	9.27	9.17
Crude protein (N×6.25) (per cent)	58.1	57.3

Misbranding of the article in each shipment was alleged in the information for the reason that the following statement regarding the article and the ingredients and substances contained therein, appearing on the label, to wit, "The Joslin-Schmidt Company, of Cincinnati, Ohio, Guarantees this 'Abattoir Brand' Digester Tankage to contain not less than * * * 60.0 per cent. of crude protein," was false and misleading in that it indicated to purchasers thereof that the article contained not less than 60.0 per cent of crude protein; and for the further reason that it was labeled as aforesaid so as to deceive and mislead the purchaser into the belief that it contained not less than 60.0 per cent of crude protein, when, in truth and in fact, it did not, but contained a less amount, to wit, approximately 58.1 per cent of crude protein or 57.3 per cent of crude protein, as the case might be.

On May 17, 1918, the case having come on for trial before the court and a jury, after the submission of evidence and arguments by counsel, the following charge was delivered to the jury by the court (Hollister, *D. J.*):

GENTLEMEN OF THE JURY:

The United States of America charges the Joslin-Schmidt Company, a concern you have heard described, with two offenses against the Food Act, which was passed by the Congress of the United States some time ago. These charges are contained in informations, as they are called, which differ from indictments in that indictments are found by the grand jury and informations are filed by the district attorney. It is immaterial to you whether this is an indictment or information, except that informations usually are filed upon misdemeanors, charging misdemeanors rather than crimes.

There is a difference between a misdemeanor and a crime in this way, if one is guilty, the greater disgrace of the one over the other, the crime having in it the meaning of infamous punishment, that is to say, punishment in the penitentiary. But the charges are criminal charges not withstanding, and the same degree of proof is required in order to prove what is alleged in an information as is required to prove what is alleged in an indictment.

The defendant starts out with presumptions in its favor, presumption of innocence, presumption of reputation and of good character. Now, those presumptions are in the nature of evidence. They attend the defendant from the beginning to the end of the case, until the jury shall think, if they should, them to be overcome by testimony and evidence beyond a reasonable doubt.

Now, a reasonable doubt has nothing especially doubtful or subtle in the meaning of it. It is a doubt for which a reason may be given, a reason satis

factory to the jury, and another way to put it is, that if the jury have an abiding conviction amounting to a moral certainty that the charge as made is true, then there is no room for reasonable doubt; and if they have not an abiding conviction amounting to a moral certainty that the charges as made are true, then they have room for reasonable doubt, and having room for a reasonable doubt, the only thing to do under those circumstances is to acquit. But if there is no reasonable doubt, then it is the duty of the jury to find them guilty.

At first the Government started out with one information containing two counts, one covering the case of the shipment to Pearson at Upland, Indiana, and the other to Krum at Milan, Indiana. In the second count, relative to Krum, reference was made to the descriptive parts of the first count and saying that they were incorporated in the second count. The district attorney, having found some mistake had crept into some part of the first count, asked the court to dismiss that count under what is called a *nolle prosequi*, a signification on the part of the Government of unwillingness to prosecute on that first count, and that was granted by the court. That left the second count in as the sole count, the sole charge in that information. While the first count was nollied, dismissed, withdrawn, nevertheless that left the reference in the second count to the descriptive part of the first count standing as a part of the second count; so that the second count of the first information, that having to do with the sale to Pearson, the shipment to Pearson, remains as the sole charge in the first information. Then the district attorney afterwards filed a second information, which contained in substance the same as the first count in the first information but with the mistake corrected. So you have two informations here, each containing one count—I think I have made it clear—one count having to do with the shipment to Pearson and the other count having to do with the shipment to Krum. The shipment in the one case was five hundred bags and the other was one hundred bags.

Now, what the Government says was an offense against the Food Act in each of these shipments was or is that in the first shipment, that to Pearson, of five hundred bags, there was a guaranty on the part of the defendant—and the same guaranty also as to the second shipment, that to Krum—that there was in this shipment 60 per cent of protein, a 60 per cent content of protein, whereas, in fact and in truth, as the information says, or words to that effect, that in the shipment to Pearson the content was only 58.1 per cent protein, and in the shipment to Krum 57.3 per cent protein content, in the one case a shortage of 1.9 per cent and in the other a shortage of 2.7 per cent.

The law under which these informations were filed, so far as we are interested in it now, says:

> "That it shall be unlawful for any person to manufacture within any territory or the District of Columbia any article of food or drug which is misbranded, within the meaning of this Act; * * * that the term 'misbranded' as used herein, shall apply to all drugs, or articles of food, or articles which enter into the composition of food, the package or label of which shall bear any statement, design or device regarding such article, or the ingredients or substances contained therein, which shall be false or misleading in any particular, and to any food product which is falsely branded as to the State, Territory, or country in which it is manufactured or produced."

Then further along it says it shall be regarded as misbranded "if labeled or branded so as to deceive or mislead the purchaser * * *."

Now, while this language says "misbranded in any particular," yet the charge is that it was misbranded because approximately the amount of protein in each of these packages was in the figures the Government charges. So we must regard this charge in the language in which it was made in the information, together with the meaning and purposes of this act.

Now, if the strict language of the act is followed, if it is misbranded in any particular, it wouldn't do to say it was misbranded approximately, because "approximately" has a different meaning, a different shade of meaning from what an exact figure would be if included within a charge of this kind. The fact of the matter is that the Government, in such a case as this, if we are to follow the testimony, could not make an exact charge, but approximately. So they are bound to say "approximately", if they are to make any charge at all.

Now, these acts are for the protection of the consumer, the public, both in food products and drugs, for humans and animals, and are to be so regarded.

But in the interpretation of acts of Congress of this kind the purposes to be accomplished are to be borne in mind, the benefits which the Congress had in mind, and the evils which they sought to remedy. And in determining in this case just what must be established to maintain the offense, those things that I have just said must be borne in mind. Especially is that true when the subject-matter of the charges is of such character that it is impossible for the Government or anybody else, according to the testimony, to say exactly what the protein content of food, hog food of this kind, is.

Now, it is conceded by the Government that there is a variation in the results of the tests that are made, even when made with the greatest care, and that those variations may run from four-tenths to six-tenths of a per cent. Now, that being so, it is only fair to say that if the defendant's product had in it—either of these cases or both, giving the defendant the benefit of every doubt—59.40 per cent, that it would still come within what the Government would claim as a 60 per cent protein content. Then, the Government says that this is short of that, that each of these shipments is short of that, in that in the one there would be, after taking away sixty-one one-hundredths from one per cent and ninety one-hundredths—you could figure that out—and in the other case more than that—that there was a claimed difference, approximately, of 2.70 per cent. The Government must admit that you can still take sixty one-hundredths off of that, off of the difference in each case, and the Government now says that even with that there is this difference which that subtraction would still leave between a 60 per cent protein content less sixty one-hundredths, the 58.1 per cent as happened in one case and 57.3 per cent in the other, and therefore the defendant has been guilty of making these two shipments with at least that much difference, or substantially that much difference, and therefore the defendant has broken this law.

Now, in that connection, inasmuch as the purposes of all these acts is to protect the public in the purchase of articles of this kind and to prevent deceit, it doesn't make any difference what the intention or purpose of the person charged with the offense is. The manufacturer may be as innocent as an angel, and as little harmful as a lamb—I don't how I could put it any better than that—that is not the question. It is different than it is in most criminal cases, in which the intent has to be proven. It does not make any difference in such a case as this what the intention is; the manufacturer may be entirely, absolutely innocent of any intention to defraud or deceive anybody, and yet under the interpretation of this law which has been made, if the thing does not come up to the representation made, then the manufacturer must be regarded as guilty, whatever his intention or purpose was; even if he had intended to put in more than what he had guaranteed, it would be improper.

So that when you have boiled it all down, there is but one question for the jury to determine, and that is, whether or not, in each one of these shipments, there was a misbranding in that the representation made was of 60 per cent and that the protein content actually present was in one case approximately only 58.1 per cent and in the other 57.3 per cent. Now, how are you going to find that out? You don't know yourselves, unless it be that some of you have had some experience in these matters. You have got to find it out from the testimony of those who have made a study of matters of this kind and have had practical experience in them. Those men are called experts, and a man is entitled to be called an expert when he is expert, and that would depend upon the amount of his knowledge, the care with which he studied, the kind of a man he is, the make-up of his mind as far as you can see it, and his experience, both theoretical and practical. And you will take all of these witnesses on both sides and measure them up and determine which of them is really, on the whole, entitled to be given the greatest credit. I won't say credit in the way of weighing their credibility—they are all presumed to tell the truth and there is no reason, so far as any one can say here, why they should not tell the truth, I will touch on that in a minute—but credit by reason of the fact that they have a knowledge which the ordinary man has not.

All of these men should be given the greatest credit in the testimony they have given to the jury by reason of all of these circumstances which have been before you. Who of these probably knows more about it? Who of these witnesses has probably the greater information than the other, if you find any difference between them at all?

Then, of course, what I said a little while ago when I was talking about credit I did not mean that to apply to credibility, yet that must be taken into consideration also, because when you are determining what weight to give to the evi-

dence of a witness, if you find any motives of self-interest or desire to see one side or the other victorious, or any motive which you may discover which will tend to color his testimony, either consciously or unconsciously, you must give that weight in determining what weight to give to his testimony.

It is the duty of the jury to reconcile the testimony whenever they can, if the testimony is conflicting. This scientific testing of food products of this kind is not exact; it is not claimed to be; the conditions are such that it is hardly within, if within, human skill and care to make them so that the results may be exact. Theoretically they may be, but practically there are considerations which develop which prevent absolute accuracy.

Now, there is evidence tending to show that there are a number of factors which must be borne in mind when one is considering the accuracy of tests of this kind—the skill of the operator, the assayist; the weather conditions, whether dry or damp; the length of exposure to the atmosphere of the article to be assayed; the purity or want of it of the acids used in the tests; and then—and I don't intend to give them all, you have heard them all and you may remember them better than I do, probably do—but there are reasons why these tests are not absolutely accurate and why they may differ from each other even when the same sample is used, growing out of different conditions, growing out of different skill, growing out of the use of different acids, which may not be equally pure or of equal strength.

There is evidence tending to show that even when the same sample has been subjected to a number of tests, and those by the same person, there is some variance, as you have heard from the testimony.

There is evidence tending to show that in this very sample of material shipped to Pearson there is a difference between the Government assay and the assay made by the Chemical Department of Indiana, the Food Department of the State Chemist—I don't remember the title exactly—but it may have been two points or over; that is to say, two per cent.

Now, you have got to take the case as you find it; you have got to take the testimony as it is and make up your mind whether these two shipments were short or not in protein content. If they were, the defendant is guilty; if they were not, the defendant is not guilty, and your verdict will be in accordance with the conclusion you reach on that main question.

Now, on the subject of tags, there was no Government requirement that any tags should be on these bags. There was a requirement by the State Chemist's Department of Indiana, whatever the name of it is, as you have heard, that if a manufacturer of this kind of a product did business in Indiana he must make a certificate to the department stating the amount of protein he proposes the product shall contain; that is to say, he represented that his product would contain in these two instances 60 per cent of protein, and thereupon the department sends to him—by "him" I mean the manufacturer, the defendant in this case—tags or cards upon which that representation is printed; then when the defendant or the manufacturer ships the product into Indiana, for sale there, he is required to attach these cards to each bag of this kind of product. And thereupon there is the representation made, to whomsoever it comes, that each bag contains 60 per cent protein content.

Now, you have heard a good deal about the way samples are made for the purposes of chemical analysis. I expect you are as well qualified, after hearing this testimony, to say what a fair sample is as anybody else. Take all the evidence on that subject and make up your mind how to get a fair sample of this kind of product, under all the circumstances. The Government shows that sometimes the way to get a sample is to use the apparatus which you saw, and introduce it into the end of a bag, the bag lying down on its side, horizontally, and from the construction of the apparatus they could get a pretty fair representation of what the core is. Another of the Government's witnesses preferred to introduce the apparatus diagonally, as I understood him to say, down to the farther edge of the bag, so that he would get something from the outer part of it and something from the inside, whereas the other way they would get only the inside. Now, Mr. Schmidt has testified that the ingredients of the product are at least three, and that they are of different specific gravity, and that when shaken together the tendency of the particles which are of denser specific gravity is to be thrown off at the side when a pile is made. I gather from what he said that that part which was thus thrown off, and of the heavier or the greater specific gravity, contains a greater part of protein than the other. He says that when the different ingredients are thrown into the hopper the same tendency prevails; that when it is dropped into the bag the

same tendency prevails; that the product is let out slowly from the hopper into the bag by some sort of a shut-off—I don't know what to call it, particularly, but you know just what I mean; that after the bag is filled the workman who is doing the work smooths off the top of the bag, and I suppose closes it up. He says the same tendency is found when the product is dropped into the bag, and that the particles of heavier specific gravity would tend to fall to the outside. That is the basis of the claim on the part of the defendant that these samples taken by the Government were not fair samples, in that they—especially in the case of those that were taken by running the apparatus through the middle of the bag, from end to end—would not come in contact to so great a degree with the particles which were of the heavier specific gravity and containing more protein, which would tend to be on the outside of the mass and more nearly within the immediate encircling canvas or burlap of the bag. And the inference is, and the argument is, that the way to get a fair sample is to run the apparatus along the inside edge, just beneath the cover—that is to say, the bag—by doing that you would be more apt to get a greater protein content there than you would in the middle of the bag, or greater than if you ran it diagonally.

All this is for you to consider and debate about, and reach a conclusion upon when you are determining the character of the samples that were obtained, and when you are considering also the way these samples were manipulated afterwards, and whether or not, under all the circumstances, if you shall find the content was short, whether or not, under all the circumstances, with that finding, the sample of two-tenths of an ounce, made the way it was, would fairly represent the homogeneity of the contents of five hundred bags, in the first instance, of one hundred pounds each, and one hundred bags in the second instance, of one hundred pounds each.

And you are not to go at these matters in a narrow way. It is a large subject; it is a large subject both from the standpoint of the Government and from the standpoint of the manufacturer, and you are to determine from all that you have heard, as well as you can, whether this discrepancy which the Government claims has been proved beyond a reasonable doubt, in each case. If it has, the defendant is guilty; if it has not been so proved, the defendant is not guilty, and your verdict will be in accordance with the conclusion you will reach in each instance. But there are, you will remember, two charges, and your conclusion will be guilty or not guilty to each charge.

Now, gentlemen, I believe I have said all I can or care to, unless you have something to suggest.

Mr. BRUCE. According to the testimony of Mr. Schmidt as to the separation of the particles, will your honor also refer to Mr. Proulx's testimony as to their making tests showing differences between the bottom and the top of the sacks?

The COURT. I had overlooked that. Just as Mr. Bruce in substance said, the tests that they had made had shown that it made no difference, as I remember it, when you were considering the question of shipment. Am I right about that?

Mr. BRUCE. Yes, your honor; these tests were made after shipment.

The COURT. These tests were made after shipment, and Mr. Proulx did say, if I remember the substance of it—and if I am not [right] I want to be corrected—that the transportation would make no difference in the dispersion of the various particles in a bag, and would not cause—the inference is—would not cause or tend to cause the segregation of one particular kind of element to itself, particles of that kind to themselves. That, I think, is the substance.

Mr. BRUCE. Yes, your honor.

Mr. OLIVER. If your honor please, I should like to ask whether that testimony wasn't in reference to fertilizer?

Mr. BRUCE. It was as to both. Mr. Proulx testified that they made a test on some five hundred shipments of fertilizer containing tankage and dried blood, to find out whether there was any difference in different parts of the sack. He also testified in a large number of cases where the manufacturers complained that their way of taking samples was not fair, that they had had a representative of the manufacturer there and they would take a new sample, using their instrument and withdrawing a core; then they would also dump the sack on the floor and take a sample that way. In those two cases he said they found no appreciable differences.

The COURT. Gentlemen, you have remembered all the testimony, I have no doubt—I hope so—and you will give such weight to it as you think it ought to have, in your judgment.

You may retire to the jury room, elect a foreman, and bring in a verdict in accordance with the law and the testimony, a verdict in each case.

Mr. OLIVER. If your honor please, I want to preserve our rights. I wish to except to that last charge as to the testimony of Mr. Proulx. I am informed that his testimony was as to fertilizer. Now, as to fertilizer——

The COURT. Just a minute—let me interrupt you. Of course, if that is so, then it was wrong to say what I did to the jury. Now, we must get that right, and the only way to do is to get it right out of what the stenographer has here. Are you going to withdraw what you said about his testimony? Are you going to withdraw what you have just said about that testimony?

Mr. BRUCE. I was going to withdraw the statement in this way, that as far as I know it makes no difference to us whether it was fertilizer or tankage. Mr. Smith said tankage and dried blood, Your Honor.

The COURT. We want to know what he said.

Mr. BRUCE. If Your Honor please, Mr. Smith has said it was a mixture of tankage and dried blood in the fertilizer.

The COURT. Are you willing to accept that?

Mr. OLIVER. No, that is fertilizer,—well, taking what he says now, then the charge, I claim now, is erroneous because a fertilizer is an entirely different thing from a digester tankage. This fertilizer is more or less wet. You can't have the same segregation in it that you would have in a dry product.

The COURT. Gentlemen, what I said about the testimony of Mr. Proulx had to do with what he said about fertilizer, and not digester tankage, and therefore the statement to you was incorrect and is withdrawn. I assumed that my young friend over there had it just right.

Mr. BRUCE. I thought it was, Your Honor.

The COURT. Now you may retire.

Thereupon the jury retired, and, after due deliberation, returned into court with a verdict of not guilty.

C. F. MARVIN, *Acting Secretary of Agriculture.*